

The 'Elegant Way' of the Constitution

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In the *Gina Miller* judgment ([\[2017\] UKSC 5](#), 24 January 2017) the eight-member majority of the UK Supreme Court uses a surprising phrase to refer to the standing of referenda in the constitution. It notes that the European Union Act 2011 adopts the more 'elegant way' of having a referendum take place after an act of parliament has approved a bill and not before (at par. 120).

The point can be understood as a practical matter. It will be awkward for parliament to be making a policy choice after a referendum has addressed the same issue. There is, however, a deeper meaning to the reference to 'elegance'. Under the British constitution, parliament is the main institution where we collectively deliberate about our future. Referenda can only supplement this process, not replace it. This relationship is a constitutional one, or a matter of higher law that ought to be always respected both in letter and in spirit. 'Elegance' here presupposes a systematic theory of the constitution, where everything has its place.

The High Court had said that the substantive rights arising out of EU law and the European Communities Act 1972 could not be abolished merely by the exercise of the royal prerogative. This is a standard interpretation of existing law, adapted for the context of Article 50. The Supreme Court accepted this, but added one further reason. It said that membership in the European Union is not merely an act of alliance with other states or an 'international' decision, as some suggested. It marks the transformation of a state's legal order.

Membership means that any law made in cooperation with those other states through the workings of the Commission, the Council of Ministers and the European Parliament – and under the supervision of the Court of Justice – becomes without any intervening step the law of the land. This is a distinct feature of the single market that allows for a fully reciprocal free movement of goods, services, persons and capital. So the European Communities Act 1972 did not merely mark the incorporation of existing substantive rights – in employment, equality, environmental or consumer law. It also marked the creation of a new law-making process.

The possible withdrawal from the EU by virtue of the passage of time under Article 50 (after two years, if there is no other agreement) will not only abolish substantive rights based on EU law but will also abolish this co-operative law-making process. Such constitutionally significant change may not happen through the Royal Prerogative. So at par. 82 of the judgment the Supreme Court's majority says: 'we cannot accept that a major change to UK constitutional arrangements' can be achieved by a ministerial decision. Constitutional change can happen, they continue, 'in the only way that the UK constitution recognises, namely by Parliamentary legislation'. The conclusion follows, they say, from 'the ordinary application of basic concepts of constitutional law to the present case'.

It sounds a mundane point but it is not. It puts beyond doubt something that many legal theorists have doubted: constitutional change cannot happen in the United Kingdom through practice, evolution or change of opinion. Constitutional change can only happen through the proper channels of democratic law-making. This is not said anywhere explicitly in our unwritten constitution, but is now held to be true as a 'basic concept' of the constitution.

The same idea was stated with great clarity in the [HS2 judgment of the Supreme Court](#) three years ago, according to which the British constitution makes a distinction – also unwritten – between 'constitutional statutes' of higher significance and ordinary statutes that may give way to the first. What is a 'constitutional statute' depends on its content and not on how it was made – since all statutes are made in the same way. The European Communities Act 1972 was one such a statute, as is the Human Rights Act 1998 among others.

It follows that an 'implied repeal' of the European Communities Act 1972 cannot be enough to set it aside. This is why, one assumes, the government's Brexit notification Bill makes explicit reference to the 1972 Act in section 1(2) – but whether this short and vague reference will be sufficient to create legal clarity, is anybody's guess.

The *Miller* judgment will be famous for its affirmation of the rule of law as against an unaccountable and overreaching executive. But it should also be remembered for marking the recognition by the UK courts of the systematic nature of the British constitution. Articulating and protecting this 'elegant way' of the constitution should be celebrated as an intellectual and a moral achievement of the highest order.

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